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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION
10

11 BLANCA ORTIZ AND CARMEN
PELAYO,

12 Plaintiffs,

13 v.
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15 AMERICAN FLORISTS'
EXCHANGE, LTD.; MICHAELS
STORES, INC.; AND DOES 1-10;,
16

17 Defendants.
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Case No. 2:15-CV-06251
Judge: Hon. Dale S. Fischer

**SUPPLEMENTAL RESPONSE TO
ORDER TO SHOW CAUSE RE:
SANCTIONS**

1 I, Gregory F. Hurley, counsel for Defendant Michaels Stores, Inc.
 2 (“Defendant”), hereby provide this supplemental response pursuant to this Court’s
 3 Order dated September 22, 2015. (Dkt. 13). I appreciate the opportunity to further
 4 respond to this Court’s inquiry regarding this rather interesting and unresolved
 5 jurisdictional question.

6 First, I will address the Court’s questions regarding the interplay between the
 7 case law cited in my original response (Dkt. 11) and the Supreme Court decisions in
 8 *Grable & Sons Metal Products, Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308 (2005)
 9 and *Gunn v. Minton*, 133 S.Ct. 1059 (2013).

10 When it enacted Title III of the Americans with Disabilities Act (“ADA”),
 11 Congress explicitly provided private plaintiffs with a right of action to enforce the
 12 ADA as to barriers to access in places of public accommodation. *See* 42 U.S.C.
 13 § 12188. In doing so, Congress granted federal district courts the power to order
 14 injunctive relief in order to enforce the barrier removal provisions of the ADA. *Id.*
 15 As recognized by the Ninth Circuit, private enforcement through litigation is one of
 16 the primary methods to effectuate compliance with the ADA and provide greater
 17 accessibility to disabled persons. *See, e.g., Doran v. 7-Eleven, Inc.*, 524 F.3d 1034,
 18 1039 (9th Cir. 2008). Under the ADA, the only remedy available to private
 19 plaintiffs is injunctive relief. *See, e.g., Wander v. Kaus*, 304 F.3d 856, 858 (9th Cir.
 20 2002); 42 U.S.C. § 12188.

21 Following the ADA’s enactment, lawmakers in the state of California decided
 22 to modify California’s Unruh Civil Rights Act (“Unruh Act”) to incorporate the
 23 ADA. *See Munson v. Del Taco, Inc.*, 46 Cal. 4th 661, 668-69 (2009). As a result, in
 24 California, any violation of the ADA also constitutes the grounds for a violation of
 25 the Unruh Act. Similarly, courts have held that a violation of the ADA also
 26 constitutes grounds for a violation of the California Disabled Persons Act (“DPA”).
 27 In California, violations of these state-law statutes not only entitle successful private
 28

1 plaintiffs to injunctive relief, but also statutory damages (assuming they can show
2 the additional state-law elements required for the awarding of damages).

3 The interplay between these respective statutes is still developing. For
4 instance, the California Supreme Court just a few years ago answered the question
5 (in the negative) of whether a private plaintiff was required to demonstrate intent to
6 recover damages under the Unruh Act where the claim was premised upon a
7 violation of the ADA. *See Munson*, 46 Cal. 4th at 678.

8 What is clear, however, is that a claim for injunctive relief under the Unruh
9 Act or the DPA is identical to a claim for injunctive relief under the ADA where the
10 claim is solely premised upon a violation of the ADA (and not a separate state law
11 standard, code, or regulation).

12 With this framework as a background, the multi-part test for federal
13 jurisdiction enunciated in *Grable* and expanded upon in *Gunn* is met for the claim at
14 issue here. According to the Supreme Court in *Gunn*, “federal question over a state
15 law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed,
16 (3) substantial, and (4) capable of resolution in federal court without disrupting the
17 federal-state balance approved by Congress.” 133 S.Ct. at 1065. Each of these
18 factors is satisfied in this action.

19 1. Necessarily Raised

20 Plaintiffs’ complaint expressly states that Defendant was violating 42 U.S.C.
21 § 12182 (Title III of the ADA) and 28 C.F.R. § 36.304 (the federal “readily
22 achievable” regulation). (Dkt. 1-1 at ¶ 5). As a result, Plaintiffs’ claim that, based
23 on violations of these federal statutes and regulations, Defendant is liable for
24 violation of the Unruh Act, California Civil Code Section 51(f). (*Id.*). For these
25 alleged violations, Plaintiffs seek injunctive relief, alongside monetary damages.
26 (*Id.* at Prayer).

27 More specifically, the facility at issue in this case is at the historical Los
28 Angeles Flower Market. Per its website, the flower market has been serving

1 Southern California since the 1920s. As a result, it long pre-dates the ADA and
 2 California access laws by decades with no recent structural upgrades. Therefore,
 3 Plaintiffs' claims for "violations" at this property will likely be based on the ADA's
 4 readily achievable barrier removal provision. California law does not have a
 5 corresponding readily achievable barrier removal requirement. *E.g. Dowling v.*
 6 *MacMarin, Inc.*, 156 F.3d 1236 (9th Cir. 1998) (Unruh Act did not incorporate the
 7 "readily achievable" standard of the ADA); Civ. Code 51(d).

8 Indeed, Plaintiffs' complaint appears to concede this issue by its allegation
 9 that: "Removing the architectural barriers referenced hereinafter, *i.e.*, the poles
 10 blocking the Plaintiffs' independent entrance into and exit from Moskatels, would
 11 have been readily achievable for Defendants (easily accomplishable and able to be
 12 carried out without much difficulty or expense)." (Dkt. 1-1 at ¶ 4). Plaintiffs'
 13 Complaint also cites to the federal barrier removal regulation (28 C.F.R. § 36.304).
 14 (Dkt. 1-1 at ¶ 5). Therefore, Plaintiffs *must* necessarily rely on a theory of liability
 15 that only exists under the ADA statute.

16 2. Actually Disputed

17 As discussed above, one of the primary points of contention in this litigation
 18 will likely be whether removal of the architectural barriers alleged in Plaintiffs'
 19 complaint will be "readily achievable." Therefore, this element is easily satisfied.

20 3. Substantial

21 According to the Supreme Court, "the substantiality inquiry under *Grable*
 22 looks instead to the importance of the issue to federal system as a whole" and not to
 23 the significance of the immediate issue contested by the parties. *Gunn*, 133 S. Ct. at
 24 1066. Therefore, this is a broad inquiry that is not necessarily focused on the
 25 question immediately facing the parties, but upon the impact of this jurisdictional
 26 question on the federal system as a whole.

27 There can be no dispute that resolution of the injunctive relief portion of a
 28 claim that is premised upon the ADA is of substantial importance to the federal

1 system. Congress specifically designed the ADA around the idea that access for
2 persons with disabilities would be enhanced through resolution of access claims by
3 private litigants in the federal courts. In effect, federal policy is to effectuate
4 improved access for persons with disabilities by permitting private litigants to
5 resolve their claims in federal court where a plaintiff has alleged a violation of the
6 ADA.

7 In fact, Congress explicitly stated that one of the purposes in passing the
8 ADA was “to ensure that the *Federal government plays a central role in enforcing*
9 *the standards established in this act* on behalf of individuals with disabilities.” 42
10 U.S.C. § 12101(b)(3) (emphasis added). It would run contrary to this expectation
11 for the federal courts to cede enforcement of the ADA to the states.

12 The situation here is directly opposite to the circumstances of the *Merrell*
13 *Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 106 S. Ct. 3229, 92 L.ED.2d
14 650 (1986) opinion discussed in *Grable*. In *Merrell Dow*, the Supreme Court held
15 that a state law tort claim that rested on a violation of a federal misbranding law did
16 not confer federal question jurisdiction despite the fact the claim would necessarily
17 involve resolution of a federal question because Congress had not provided a private
18 federal cause of action for violation of the federal branding requirement. *Id.* at 812,
19 *Grable*, 545 U.S. at 316.¹ The Supreme Court found it would flout Congressional
20 intent to conclude that federal courts would otherwise exercise jurisdiction in such
21 circumstances. *Id.*

22 The Ninth Circuit’s decision in *Wander* is in accord with this principle
23 because it declined to extend federal jurisdiction to state law claims for *damages*
24 that were premised upon the ADA because Congress did *not* create a federal cause
25 of action for damages based on ADA violations. *Wander*, 304 F.3d at 859.

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27 ¹ Similarly, at issue in *Grable* and *Gunn* were two state law private rights of action
28 that do not exist under federal law (quiet title and a legal malpractice claim).

1 By contrast here, Congress has expressly provided a private right of action to
 2 private plaintiffs for an alleged violation of the ADA to seek injunctive relief. It
 3 would flout Congressional intent to divest the federal court of jurisdiction of a claim
 4 for injunctive relief under the ADA where one was expressly provided.

5 Put another way, this inquiry might ask: Can a state effectively divest a
 6 federal court of jurisdiction by enacting an identical private a right of action
 7 incorporating a federal law and permitting that action to be brought in state court?
 8 The answer must be no. Otherwise, Congressional intent for the federal courts to
 9 decide and determine that private right of action would be thwarted. Not only are
 10 there immediate policy concerns about ensuring access for persons with disabilities
 11 and consistent enforcement of access regulations by vesting that responsibility with
 12 the federal courts, but there is a constitutional concern about permitting state
 13 legislatures to override Congressional intent and divest federal courts of original
 14 jurisdiction to hear certain claims.

15 This issue was identified by the District Court in *Pickern v. Best Western*
 16 *Timber Cove Lodge Marina Resort*, 194 F. Supp. 2d 1128 (E.D. Cal. 2002). In
 17 holding that federal question jurisdiction must exist in circumstances such as those
 18 present here, the *Pickern* court reasoned:

19 State law provides for injunctive relief as well as damages, *see*
 20 Cal. Civ. Code § 52.1(b), and it is possible for a state law claim
 21 for injunctive relief to be premised solely on a violation of the
 22 ADA. Such a claim would be no different from a federal ADA
 23 claim. Federal question jurisdiction must exist in those
 24 circumstances. Simply by incorporating the ADA into state
 25 law, state legislatures cannot divest the federal courts of
 26 original jurisdiction over state claims that are, for all intents
 27 and purposes, federal ADA claims. State claims for damages,
 28 on the other hand, are not identical to federal ADA claims for

1 injunctive relief. Thus, federal courts would have original
 2 jurisdiction over state claims for injunctive relief, and
 3 supplemental jurisdiction over state claims for damages.
 4 *Id.* at 1132 n.5 (emphasis added).

5 Therefore, the interest in the federal system of being able to retain jurisdiction
 6 of claims that Congress expressly authorized and directed the federal courts to hear
 7 is of “substantial” importance to the federal system as a whole.

8 4. Capable of Resolution in Federal Court without Disrupting the
 9 Federal-State Balance Approved by Congress

10 This final requirement “is concerned with the appropriate ‘balance of federal
 11 and state judicial responsibilities.’” *Gunn*, 133 S.Ct. at 1068. In *Wander v. Kaus*,
 12 304 F.3d 856, the Ninth Circuit struck the balance between resolving these claims
 13 by allocating responsibility of the damages claims under California law to the state
 14 court – but only once the injunctive relief claims are resolved. This pattern has been
 15 consistently followed by federal district courts in California ever since. In practice,
 16 this permits the federal courts to ensure that public accessibility issues are actually
 17 addressed through the injunctive relief portion of a claim and leaving the secondary
 18 question of whether a particular plaintiff is entitled to damages to the state courts (as
 19 that remedy is exclusively available under state law).

20 Similarly here, Plaintiffs’ injunctive relief claims here are capable of
 21 resolution by the federal court and, if the injunctive relief claims are moot before
 22 trial, the damages claims can be resolved by the state court if the federal court elects
 23 to decline supplemental jurisdiction. The recognition of this possibility is precisely
 24 why the court in *Fontano* determined that it was at the very least arguable that the
 25 federal courts would have jurisdiction over a state law claim for injunctive relief
 26 where it was premised on the ADA. *Fontano v. Little Caesar Enterprises, Inc.*,
 27 2010 WL 4607021 (C.D. Cal. Nov. 3, 2010) (“Without any evidence that Plaintiff’s
 28 claim for injunctive relief was moot at the time Defendant removed the case to

1 federal court, it is at the very least arguable that this Court had federal-question
2 jurisdiction over Plaintiff's section 51(f) claim.”).

3 Therefore, each of the four factors is satisfied and would have permitted the
4 Court to retain jurisdiction here. At the very least, the question is still very much
5 being actively litigated in this district.

6 For instance, in *Jackson v. Yoshinoya Am., Inc.*, 2013 WL 865596 (C.D. Cal.
7 Mar. 7, 2013), another defendant attempted to remove a state law disability access
8 claim where a plaintiff sought both injunctive relief and damages. Following
9 removal, the plaintiff filed a motion to remand. In its opposition, the defendant
10 asserted arguments similar to those made by counsel here. In that case, the court
11 found that federal jurisdiction was lacking because plaintiff in *Jackson* (1) premised
12 his state law claim for injunctive relief solely on state law violations, and (2) it was
13 possible for the court to award relief without *necessarily* deciding a federal issue.²

14 After remanding the case, the *Jackson* court addressed plaintiff's request for
15 attorneys' fees incurred in filing the motion to remand. The *Jackson* court declined
16 to award fees because it found defendant's argument for removal was objectively
17 reasonable and stated:

18 Given the manner in which the complaint was drafted,
19 referencing at various points the ADA and the ADA
20 Accessibility Guidelines promulgated pursuant thereto, and
21 given the dicta in *Pickern*, the court concludes that defendants
22 had an objectively reasonable basis for removing under 28
23 U.S.C. § 1331.

24 *Id.* at *12 (emphasis added).

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26
27 ² By contrast here, Plaintiffs are pleading a claim based upon the readily achievable
28 standard that exists solely under federal law.

1 Therefore, counsel again respectfully submits that it is not appropriate to
2 sanction counsel for advocating a position that remains unsettled even if the Court
3 disagrees with counsel's asserted argument.

4 Second, I will address the Court's concerns regarding the removal of other
5 actions that I have handled.

6 I have devoted my practice for the last 20 years to the defense of disability
7 access discrimination claims. As the Court noted, there is no question that ADA
8 access claims arise frequently in federal litigation and there are no shortage of
9 plaintiffs alleging violations. As a result, I defend a high volume of claims.

10 One of the first issues decided in any litigation is where the appropriate
11 jurisdiction is for a particular claim. As removing the case from state to federal
12 court is an option, but not a requirement, for the defendant, I am frequently required
13 to advise my clients about the decision to remove a case. In many cases, the client
14 has chosen not to seek removal and has opted to litigate in state court. In some
15 cases where the client has elected to seek removal of similar actions, the plaintiff
16 nor the court have challenged jurisdiction following removal.

17 In the situations where the court or a particular plaintiff challenges the
18 decision to remove, I am also required to advise my clients about whether to contest
19 the removal or stipulate to remand when the issue is raised. Clients have chosen not
20 to contest the removal for a number of reasons, not the least of which is that winning
21 would mean having the case litigated in a court that believed that it should not hear
22 the case. In other cases, clients have simply decided it was not worth the resources
23 to fight the issue or have preferred to engage in settlement discussions. Each
24 decision was made on case-by-case basis based on the preferences of the client and
25 the facts and circumstances of the underlying litigation.

26 Regarding the format of my removal papers, I have typically identified, as
27 here, the basis for removal as an action alleging violations of the ADA and the fact
28 that I believed this case alleged violations that exclusively exist under federal law.

1 28 U.S.C. § 1446(a) simply requires that the notice of removal must contain “a short
2 and plain statement of the grounds for removal” and is similar to the burden placed
3 on plaintiffs in pleading jurisdictional allegations. *See also Dart Cherokee Basin*
4 *Op. Co., LLC v. Owens*, 135 S. Ct. 547, 553 (2014) (“By design, § 1446(a) tracks
5 the general pleading requirement stated in Rule 8(a) of the Federal Rules of Civil
6 Procedure.”).

7 The notice of removal filed in this action noted the jurisdictional statute and
8 plainly states that “it appears from the Complaint that this is a civil rights action
9 alleging violations of the [ADA].” (Dkt. 1 at ¶¶ 3-4). As recognized by the courts
10 in *Jackson*, *Fontano*, and *Pickern*, it is at the very least plausible that federal
11 jurisdiction exists here under these facts. I am not aware of an additional
12 requirement to plead the legal theory of jurisdiction in the notice of removal.
13 However, I appreciate the Court’s concern regarding the notice of removal filed in
14 this case and understand the need to fully apprise the Court of a claimed
15 jurisdictional ground.

16 Please let me know if the Court has any other questions or concerns regarding
17 this matter.

18 Dated: September 28, 2015

19 SHEPPARD, MULLIN, RICHTER & HAMPTON
20 LLP

21
22 By /s/ Gregory F. Hurley
23 GREGORY F. HURLEY

24 Attorneys for Defendant Michaels Stores, Inc.
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